No. 85-5348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID BUCHANAN, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I.

DID THE FEDERAL CONSTITUTION PERMIT THE STATE TO ELIMINATE, BY PEREMPTORY AND CAUSE CHALLENGE, 20% OF THE QUALIFIED VENIRE BASED ON RELIGIOUS OR POLITICAL VIEWS ON CAPITAL PUNISHMENT WHEN THE STATE DID NOT SEEK THE DEATH PENALTY AGAINST PETITIONER AT A JOINT CAPITAL/NON-CAPITAL TRIAL?

II.

CAN A JUVENILE COURT-ORDERED PSYCHIATRIC EXAMINATION, DIRECTED AT COMPETENCY TO STAND TRIAL WITHOUT WAIVER OF THE CHILD'S 5TH AND 6TH AMENDMENT RIGHTS, BE USED TO REBUT A MITIGATING MENTAL STATE DEFENSE BY READING THE REPORT TO THE JURY DURING A MURDER TRIAL?

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OPINION AND JUDGMENT BELOW

Judgment was entered by the Jefferson County, Kentucky, Circuit Court on September 17, 1982 [Joint Appendix, hereinafter A 76-79]. The opinion of the Kentucky Supreme Court was rendered on June 13, 1985 and is reported. *Buchanan* v. *Kentucky*, 691 S.W.2d 210 (Ky. 1985) [A 80-84].

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on June 13, 1985. No rehearing was sought. The petition for writ of certiorari was filed on August 12, 1985 and was granted May 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law; nor deny to any person . . . the equal protection of the laws.

KY. REV. STAT. 29A.300, entitled "Oath to petit jury":

> The court shall swear the petit jurors using substantially the following oath: "Do you swear or affirm that you will impartially try the case between the parties and give a true verdict according to the evidence and the law, unless dismissed by the court?"

Kentucky Rule of Criminal Procedure, RCr 9.16, entitled "Separate trials," in pertinent part:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder . . . of defendants . . . for trial, the court shall . . . grant separate trials of defendants or provide whatever other relief justice requires . . .

STATEMENT OF THE CASE

a. Pre-Crime Psychological Reports

In the summer of 1980, David Buchanan just turned 16. He was a ward of the Commonwealth, having been sent to Danville Youth Development Center by the Jefferson County, Kentucky, Juvenile Court [Joint Appendix, A 38]. David was a black youth who "comes from a fairly typical poor urban home" [A 44, 64]. He had been in juvenile court for various offenses "ranging from theft over $100 to robbery" [A 44, 64]. Two psychologists filed a report recommending transfer to another juvenile facility due to "David's emotional disturbance and his resentment of his placement . . ."

> *Test Results:*
>
> David obtained Full Scale, Verbal and Performance WAIS I.Q. scores of 74, 76 and 75 respectively. These scores fall in the *Borderline range of intellectual functioning.*[1] Among the Verbal subtests David is markedly deficient in Verbal Comprehension . . .
>
> * * *
>
> David's responses to projective tests suggest an individual who is isolated, mistrustful of others and interpersonally deficient. His reproductions of the Bender designs are indicative of *emotional disturbance.* Along with his test behavior and flat affect, his pattern of test responses suggest a *mild thought disorder.* [A 62].

[1] All emphasis supplied by petitioner unless otherwise indicated.

So in August 1980 David was transferred to Northern Kentucky Treatment Center. A licensed clinical psychologist employed by the Commonwealth gave David various tests and a "diagnostic clinical interview." His report states:

> David Buchanan presents as a quiet, rather withdrawn, and at least moderately depressed sixteen-year-old black youth. He is oriented for time, place, and person. *His thinking*, however, *is extremely simplistic* and very concrete. *Impulse controls under even minimal stress are felt to be very poor.* He is not seen as sophisticated, but rather as a *very dependent, immature, probably pretty severely emotionally disturbed,* and *very easily confused youth.* Short-term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. *Judgment is impaired.* Interaction with peers is likely to be extremely superficial and very guarded. David uses the psychological defenses of projection, denial, rationalization, and isolation extensively. He will be *easily led by other more sophisticated delinquents* or youths. He has very limited interpersonal skills and is *likely to be seen by other youth as a pawn* to be used.
>
> David's human figure drawings are extremely bizarre. Combined with his flat affect and depressed mood, as well as other suggestions of a cognitive or thought disorder, it is felt that this individual has the potential for developing a *full blown schizophrenic disorder.* At the present time, he is at least extremely mistrustful, suspicious, and even paranoid. He is in need of *ongoing extensive mental health intervention* in addition to a highly structured but minimally stressful, from a psychological point of view, residential environment.
>
> In view of the presence of extreme unmet dependency needs, early and sustained frustration, and minimal success in almost any endeavor there exists the strong probability that underlying considerable passivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstance, David could be expected to be dangerous with respect to acts against persons. While this has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition.
>
> *DIAGNOSIS:*
>
> Undersocialized Aggressive Conduct Disorder DSM III.

Personality Disorder (paranoid personality) (The possibility exists for regression in psychological functioning to a *full blown psychotic or schizophrenic state in the future*) [A 65, 66].

Based on Dr. Noelker's evaluation, David was "admitted . . . to . . . Northern . . . for treatment" on August 28, 1980 [A 67]. One month later, the "unit director" at Northern reported to Martha Elam, David's social worker, that David was "extremely resistive to all treatment methods utilized thus far . . ." [A 68]. David was reading "on . . . the fourth grade level and almost able to perform fifth grade math" [A 69].

Two weeks later, October 10, the "unit director" wrote to the juvenile court judge informing him they were releasing David. "Although we can not predict future behavior, we certainly feel that David is better able to cope with personal problems . . . He will, of course, remain under supervision of" the Commonwealth's Department for Human Resources and his social worker, Ms. Elam[2] [A 70].

David returned to live with his mother on October 13, 1980. He was initially assigned to "the regular academic program" in the 10th grade. Apparently when his teacher complained, "it was determined that David needed to be in EMH [Educatable mentally handicapped] classes . . . David's attendance was sporadic . . . irregular" [A 51-52]. Although "regular school attendance" was required and the Commonwealth could have "reinstitutionalized the child", no action was taken [A 52-53] although his teacher reported to his social worker that the "[s]chool was unable to find him, he was not going to school" [A 50].

b. The Killing of Baerbel Poore

January 7, 1981, was a cold, snowy winter day. David Buchanan and his young friend Troy Johnson "started talking about [not having] . . . any money." David went out to shovel

[2] Ms. Elam was to later testify at trial that "this letter was [not] an accurate appraisal of David's progress." Under Kentucky procedure the juvenile judge could have rejected David's release [A 49].

snow but came back with only "change." "[T]hat's when he started talking about Checker Oil Station . . . robbing it." David "said nobody would get hurt." When David promised "nobody would get hurt or nothing", Troy got a gun and "bullets from where my brother keep them" without his brother's knowledge [Transcript of Evidence, TE 1030-31].

Troy refused to actually go to the station itself but agreed to drive. David talked to another juvenile, Kevin Stanford, about the robbery.[3] They drove Troy's car and picked up Kevin who lived near the gas station [TE 1033]. David and Kevin left Troy at the car. Stanford had the gun. They saw the white female attendant, Baerbel Poore, getting ready to close up and approached her. Stanford took Baerbel back to the restroom while David tried to get the safe open. He couldn't and so he went and found Stanford "having intercourse with the service station attendant . . . and they took turns raping and sodomizing" her [TE 484-85].

Since they didn't have any fuel, David took $2.00 worth in a gas can [TE 485]. While he was gone, unbeknownst to David, Kevin stole $143.07 from the cash register [TE 1319]. Stanford then took Ms. Poore in her car and "told [David] to get into the car with Troy and follow" Baerbel's car [TE 485]. David told Troy they were following Ms. Poore's car because they were going "to have some more sex with her." Troy pulled up behind Baerbel's car a few blocks away. David got out. As he approached, Stanford leaned in the window of Baerbel's car and shot her. David turned and ran back to the car as Kevin fired another shot at the victim, killing her [TE 1037-38].

Stanford returned to Johnson's car, got in and gave Troy the gun back. Kevin got out near the Checker station [TE 1041]. Troy and David went home and put the gun back [TE 486]. Stanford stole 300 cartons of cigarettes from the empty gas station, later selling them on his own [TE 946].

[3] David Buchanan's confession differed slightly from Troy's testimony. David told Det. Hall that Stanford telephoned David and asked David to meet him (Kevin) "and to bring a gun with him that he had a place that needed to be taken down" [TE 484].

c. Pre-Trial Motions

After their arrest, Stanford and Buchanan, but not Johnson,[4] were transferred from juvenile to adult court.[5] Prior to waiver, the juvenile court, apparently on his own motion, "requested" a "mental status exam" of David by a psychiatrist.[6] Dr. Robert Lange saw David for "one hour" on August 14, 1981 after reviewing his social worker's records. "The discussion focused on the here and now, since the goal was to ascertain meeting of the 202A criteria[7] or not." Dr. Lange reported his "impression" to Judge Fitzgerald in a brief letter: "It is my opinion that David is competent to stand trial and that he presently does not meet the criteria for KRS 202A involuntary commitment" [A 72-73].

Buchanan argued pre-trial that any death sentence would be disproportionate considering his age, emotional disturbance and relative culpability[8] [R 330-333]. He also sought to prevent a capital prosecution since the Kentucky legislature had abolished the death penalty for juveniles although the statute

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[4] Johnson pled guilty to accomplice liability in juvenile court [TE 1029] in return for testimony [Transcript of Record, No. 1218, R 359].

[5] The judge did find Buchanan "amenable to treatment" [R 357].

[6] In circuit court Buchanan's counsel objected to evaluation of his client by a "state expert as to his competency" since any unfavorable report might be used "against my client" [TH 12/18/81, 6]. He asked for "an expert to help to develop . . . a defense relating to . . . emotional disturbance which is a different issue obviously than competency . . . and until I decide to use [it] . . . that report would remain privileged . . . which is the difference . . . [from a] competency to stand trial" report [TH 12/18/81, 7].

[7] KY. REV. STAT. Chap. 202A is entitled "Hospitalization of the Mentally Ill".

[8] In *Smith* v. *Commonwealth*, 634 S.W.2d 411, 413 (Ky. 1982), the Court held that a trial judge can preclude the death penalty prior to trial. The Court reasoned that "the ultimate decision of penalty is within the province of the trial judge" under Kentucky law. "It, therefore, becomes self-evident that the court should not be required to entertain an exercise in futility . . . when it will ultimately decide, for as significant a reason" that any death sentence would be "disproportionate." In *Smith*, the same trial judge as here had barred the death penalty for a non-triggerman since the actual killer had received a bargained non-death plea.

hadn't yet taken effect[9] [R 423-425]. Third, petitioner moved to dismiss the capital portion of the indictment based on uncontradicted evidence that: 1) he was not the "trigger-man", Stanford was; 2) Troy Johnson supplied the gun; and 3) David had no intent to kill and didn't know Stanford was going to shoot Ms. Poore. Troy testified:

> Q: So both you and David thought that the gun wasn't going to be used, isn't that true?
>
> A: Yes, sir.
>
> * * * *
>
> Q: So David never spoke about anything else?
>
> A: No sir.
>
> Q: Especially shooting anybody?
>
> A: Yes sir [A 21-22].

An off-the-record hearing was held when the judge expressed concern whether the "only evidence is that Buchanan [was a] non-triggerman." At the hearing, the prosecutor "ha[d] no objection" to dismissal of the "capital portion of the indictment . . . [it was] conceded by Com[monwealth] Atty. [sic] death penalty would be unconst. [sic] for Buchanan, Enmund v. Fla. [sic]."[10] The judge signed the order barring the death penalty for petitioner [A 24].

d. "Death-Qualification"

Buchanan moved to preclude "death-qualification of [the] jury" until after the "guilt/innocence phase . . . '[D]eath-qualification' voir dire violates the defendant's right to an impartial jury drawn from a fair cross-section of the community under the Sixth and Fourteenth Amendment . . ." He also relied on "equal protection of the law", complaining that juror views on the death penalty are "arbitrarily single[d] out . . ." Petitioner

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[9] KY. REV. STAT. 208F.040(1), and the rest of a new juvenile code was enacted but repeatedly postponed by the legislature due solely to lack of funding [Transcript of Hearing, TH 3/8/82, 7].

[10] Judge's handwritten notes on order [TR 170].

complained of restriction of "voir dire by the defense on the issues of punishment" while allowing "use by the state of 'death-qualification' voir dire" denies "due process of law" because it affords "the state an advantage in jury selection" [A 5-6].

Buchanan also moved for "separate juries for guilt/innocence and sentencing phases" with no disqualification for capital punishment views by the guilt/innocence jury. Referring to "scientific studies" and filing one,[11] petitioner complained that "jurors who are in favor of capital punishment are 'authoritarian types' and are more likely both to convict and to give greater sentences . . ." The state interest in a single jury was said to be minimal or non-existent [A 3-10].[12] The prosecutor opposed the motions as "contrary to current law" [A 11].

The trial judge told Buchanan's lawyer his suggested remedies "show[ed] a lot of creativity" [A 14]. The court mentioned another remedy—voir dire on the death penalty after the guilt phase with, presumably, substitute jurors replacing anyone who couldn't follow the sentencing law [A 16-17]. However, the motions were denied, although they "involve some unique, new creative . . . principles of law . . . [I]f you want to strike new ground . . . address . . . the appellate court" [A 18]. The motions were renewed and denied as "death-qualification" began [A 26-27].

Judge Liebson ruled that he alone would question the jurors on the subject of the death penalty.[13] For the most part, this

[11] Zeisel, *Some Data on Juror Attitudes Towards Capital Punishment* (University of Chicago Monograph 1968) [Zeisel].

[12] Buchanan pointed out that, in addition to capital prosecutions under KY. REV. STAT. 532.025, Kentucky also provides for a bifurcated procedure in persistent felon cases. KY. REV. STAT. 532.080(1) specifically permits a new jury for phase II of a persistent felon trial "for good cause." Having shown "good cause", petitioner argued for the same procedure to be applied to his case.

[13] In Kentucky, the court "may permit" counsel to voir dire or "may itself conduct the examination" if it permits counsel to "supplement the examination" by tendering "such additional questions" as the court "deems proper." RCr 9.38.

consisted of a single question:

> Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstance *in this or in any other case* and regardless of what the evidence may be? [A 27].[14]

Counsel for Stanford[15] tendered proposed death penalty questions focusing on four essential points. First, whether the veniremember could consider authorized punishments other than death. For example:

> 1. Do you believe that all persons convicted of the crime of murder should receive the death penalty?
>
> 2. Would you automatically vote in favor of the death penalty . . . even if you had the discretion to give a lesser punishment?
>
> * * * *
>
> 4. Would you automatically vote for the death penalty regardless of any mitigating evidence offered by the defendant as to why he should not get the death penalty?
>
> * * * *
>
> 17. . . . [Could you] consider, according to the law . . . all possible penalties, including the term of years in prison between 20 and life, a life sentence and the death penalty?[16]
> [Transcript or Record, No. 406, TR 210].

[14] Often the words "conscientious scruples" were substituted for "personal convictions" [TE 65, 69, 71, 73, 76-77, 80, 82, 85, 89, 91, 96, 99, 107, 110, 113, 115, 118, 124, 126, 131, 133-34, etc.]. Sometimes the court referred to "religious convictions or philosophical or ethical convictions" [TE 226].

[15] The court ruled that "whenever any defendant makes an objection . . . the other defendant . . . automatically . . . [has] the same objection . . ." The prosecutor agreed: "I think that would be proper because . . . Buchanan is not involved in . . . death-qualification" [A 28]. The judge stated this also: "You're not even involved" [A 28].

[16] KY. REV. STATS. 507.020 (murder) and 532.025 (penalty phase) permit the jury a range of punishment in capital cases of 20 years to death.

Second, the proposed questions distinguished, unlike the court's single inquiry, between the case at hand and any other case:[17]

> 24a. Is it your irrevocable position that you would vote automatically against the imposition of capital punishment no matter what case you had before you?
>
> 24B. Could you think of any case in which you may consider the death penalty? [TR 214].

Third, counsel suggested finding out if the potential jurors could follow the law, notwithstanding personal views:

> 24c. Even though you believe capital punishment should never be inflicted could you nonetheless subordinate this personal view to your duty to abide by your oath as a juror and to obey the law of this state which says that you should consider such punishment in connection with other possible punishments of life imprisonment and imprisonment for a period of 20 years to life? [TR 214].

Fourth, a request was made to minimize any misunderstanding as to why the judge was asking question(s) which seemed to emphasize the death penalty:

> 25. Do you realize what you say here and your oath as a juror does not bind you to vote for the death penalty, nor does it bind you to vote for any punishment, but to consider all punishments you are instructed on?
>
> 26. Even though you have been asked several questions concerning the death penalty do you realize that you may not even have to reach that decision? [TR 214].

All of these questions were rejected, the court permitting "one question and one question only . . . we are not going to be involved in any . . . brainwashing procedure . . ." [A 12].

> THE COURT: I don't think rehabilitation cures anything in my mind. If a guy says that he is unalterably opposed to giving the death penalty and you then got him to say that he would put aside his own personal opinion and follow the law, I would not know what to believe about the state of that man's mind [A 14].

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[17] Another question sought to ascertain whether death penalty views would "affect your ability to return a fair verdict on guilt or innocence"—identifying so-called "nullifiers" [TR 214].

* * *

> I intend to be very liberal about . . . excusing people for cause . . . if somebody . . . has . . . some sort of bias . . . I don't intend to . . . ask if you can put your personal opinion out of the way . . . [A 15].

Seven jurors were excused for cause, over objection, due to views regarding capital punishment.[18] Four others who indicated some hesitancy about capital punishment[19] were struck peremptorily by the prosecutor [TR 219]. Thus the "death-qualification" process permitted the prosecutor to identify and excuse 11 of 53 otherwise qualified veniremembers—approximately 20% of the panel.[20]

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[18] 1. *Aspatore:* "I would hate to . . . I don't think I could . . . I haven't never been on a jury before . . . I haven't been exposed to this . . . I just don't think I could give anybody the death penalty" [A 29-30].

2. *Cain:* "Would you repeat that . . .? I don't know . . . I don't know if I could decide that or not . . . it would be hard . . . Is that what this case is about . . .? I don't think I could decide that" [A 30-31].

3. *Ehman:* "I don't know . . . I just couldn't see making that kind of decision. It's kind of hard for me to do . . ." [A 32].

4. *Englert:* "I think I would have a hard time . . . I wouldn't vote for the death penalty, I know that . . ." [A 33].

5. *Roundtree:* Because of "my religious convictions . . ." [A 34].

6. *Sebrey:* "I . . . don't believe I should take a life" [A 35].

7. *Frye:* "I just don't think I could do that . . . I was taught . . . in the church . . ." [A 36].

[19] 1. *Cockerel:* "If the evidence proved they were guilty and it was necessary, I think I could" [TE 89].

2. *Kargl:* "As a mother, no, I don't think I could personally take on that responsibility" [TE 136].

3. *Roden:* "I really don't know about that" [TE 175].

4. *Williams:* "I don't know" [TE 204].

[20] Judge Liebson qualified 46 potential jurors [TE 269]. Since 7 were excused for death penalty views, 53 of the venire were qualified *as to petitioner.* The panel of 46 was reduced to the ultimate 12 by random draw [TE 269-71; 1342] and peremptory strikes. Over defense objection [TE 3/1/82, 21-27], the prosecutor was permitted 6 strikes and each defendant 5 for a combined total of 10 [TR 218-20]. Other veniremembers were excused, of course, for reasons not in issue here.

For example, 21 of the 59 veniremembers were excused on the first day of trial (the jurors last day of service) because they didn't want to or couldn't serve an additional two weeks. The trial judge earlier had considered Buchanan's objection and conceded such a procedure might implicate Buchanan's right "to a jury of draftees, not a jury of professional volunteers . . ." but started jury selection that day anyway [TH 3/1/82, 54-55].

e. Trial, Verdict And Appeal

Buchanan's defense (actually the prosecution's evidence) established that Stanford was the main actor and emphasized the lack of proof that David agreed, knew or should have known[21] Stanford was going to execute the victim.[22] He called, as his only defense witness, David's social worker. Ms. Elam read to the jury the pre-crime psychological reports. In response, the prosecutor asked about "later psychological or psychiatric reports." Defense counsel objected to the use of a "competency . . . evaluation [to rebut an] emotional disturbance [defense] . . . when the reports . . . are at the demand of . . . this Court and another Court. . ." [A 55]. Additionally, petitioner complained that "counsel was not present and was not informed he could be present and David was not informed, at that time, that they could be used against him . . . I would cite *Estelle* . . ." [A 57]. Ms. Elam read Dr. Lange's report[23] [A 58-59].

> He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range . . . David states at times he has been very angry at certain people, staff at the center and thought about hurting them [A 59].

In closing, defense counsel conceded David's guilt of robbery but not of sexual assault. He argued: "David Buchanan had no

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[21] The primary question in petitioner's case was whether the jury believed he had the "intent to cause the death of" Baerbel Poore or "wantonly engage[d] in conduct which create[d] a grave risk of death to" her. KY. REV. STAT. 507.020(1)(a) and (b).

[22] If this was the purpose of the car trip it was certainly illogical and only created an opportunity for witnesses to view the slaying, as they did [TE 953-992]. The prosecutor agreed that petitioner was not guilty of kidnapping Ms. Poore from the gas station and refused to proceed on the grand jury indictment for this offense [A 4; TH 3/9/82, 4].

[23] The reason that the prosecutor had to reach back to the juvenile court competency report was that the two circuit court competency reports were sealed in the record as "privileged at least as to . . . the Commonwealth, because . . . the Court is ordering . . . its own evaluation . . . [of] the defendant's ability to stand trial . . ." [TH 12/18/81, 11; R 396, TR 377]. Judge Liebson stated in his order: "It appears to the Court from personal observation that there may be a need for treatment . . . [K]eep as long as he needs treatment" [TR 126].

idea whatsoever what was in Kevin Sanford's mind" [TE 1289]. If guilty of any degree of homicide, he was under "extreme emotional disturbance" which mitigated the offense[24] and the punishment [TE 1305].

The prosecutor's first line of attack in closing was the competency exam: "[D]o you remember when he put Ms. Elam on, he didn't mention anything . . . [about] that last psychological or psychiatric evaluation . . ." [TE 1309]. However, his basic position vis a' vis petitioner was that there was a "conspiracy" because David "starts the ball rolling" [TE 1319]. Contrasting the two defendants, the Commonwealth argued that Stanford's guilt of murder "did not stem from just his participation in the robbery" as Buchanan's did.

> I am not asking you to find [Buchanan] guilty [of intentional murder] . . . [T]o be perfectly honest with you . . . [Buchanan's] involvement comes up because he was involved in the conspiracy to commit the robbery . . . [TE 1336].

The prosecutor argued for a "wanton" murder conviction. However, he didn't get it. The jury gave the Commonwealth a verdict of *intentional* murder despite the prosecutor's candid admission that the evidence did not support such a verdict. The jury recommended a life sentence and took the unusual step of insisting that it be "served consecutively with any other sentence."[25] David was also convicted and given the maximum

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[24] Absence of "the influence of extreme emotional disturbance" was an element of intentional murder under KY. REV. STAT. 507.020(1)(a). See note 64. But the "reasonableness" of the emotional disturbance "is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be . . ." Thus, this all white, death-qualified jury of 12 was required by law to try to understand the situation from David Buchanan's perspective. The ability of this jury to do so was critical to justice. The prosecutor, on the other hand, argued about what "any reasonable person" would have done [TE 1312].

[25] In Kentucky, the jury is the sentencing authority. RCr 9.84; *see, e.g.*, *Cornelison* v. *Commonwealth*, 2 S.W. 235 (Ky. 1886). There are no standards or guidelines for the exercise of sentencing discretion. KY. REV. STAT. 532.070(1) permits a judge to reduce a jury sentence if it is "unduly harsh." However he can not impose a stiffer penalty. The trial judge said he "never had a case" where the jury volunteered "consecutive" sentencing [TE 1349].

sentence (20 years) for robbery, rape and sodomy also "to be served consecutively . . ." [TE 1347-48]. Co-defendant Stanford was similarly convicted but was sentenced to death on the murder conviction [TE 1542; R 397-400].

On appeal, the Kentucky Supreme Court held that in "a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the [non-capital] defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community . . . Such a process furthers the interests of both the defendant[26] and prosecution . . ." [A 81-82]. *Buchanan*, 691 S.W.2d at 211-12.

The Court also held that reading the juvenile court competency exam to the jury in rebuttal was "proper" because "the objective observations" in the letter were admissible. Anyway, it was "harmless beyond a reasonable doubt . . . [since] the murder was well planned and premeditated."[27] *Estelle* v. *Smith*, 451 U.S. 454 (1981) was inapplicable since "the report contains no inculpatory statements . . . or any accusatory observation by the examiner . . ." and because Buchanan had already "waived his right to silence by giving the police a confession . . ." [A 84]. 691 S.W.2d at 213.

SUMMARY OF ARGUMENT

I. Death-Qualification

Unlike Ardia McCree, petitioner does not seek to topple a practice deemed essential to the state's concededly legitimate use of capital punishment. Rather, David Buchanan asks only that he not be unnecessarily and unfairly swept along by another's capital prosecution and tried before a tribunal, if not organized to convict, undeniably organized to punish with uncommon severity.

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[26] The Court did not explain how death-qualification served any interest of David Buchanan.

[27] The Court did not point to any evidence of this relevant to David. There was none.

Petitioner's primary reliance is upon the Sixth Amendment's guarantee of an impartial jury—both in guilt determination and, in Kentucky at least, sentencing. Common sense, experience, buttressed by uncontradicted social science evidence, demonstrates that death-qualified juries are, if nothing else, more punitive. Indeed, they are much more than that. Proponents of the death penalty are demonstrably more likely to treat the David Buchanans of the world—low status, juvenile, criminal defendant—more harshly, less likely to consider mitigating mental state evidence, and more likely to convict, and convict of the highest offense.

Unlike Ardia McCree, Buchanan does not argue in the abstract. This jury was not impartial—in a constitutional sense. This jury was unusually punitive, adopting a theory of maximum liabillity for Buchanan even the strong-armed prosecutor thought unsupported by evidence. The reason this jury was prosecution-prone is that 20% of the qualified panel was purged for reasons unrelated to Buchanan's case—solely because they held political or religious views otherwise entitled to constitutional protection.

Surely Buchanan is then entitled to some inquiry as to the state interest at stake. If so, petitioner must prevail because the cost to the state is slight. It appears that in the last 10 years of capital prosecutions in Kentucky this may be the only case where a non-capital accused was jointly tried with a capital defendant. At most, there are few. Available to the Commonwealth are numerous remedies—some of which do not involve separate trials: 1) simultaneous juries; 2) separate juries; possibly 3) a jury less than 12 for capital sentencing; 4) a non-unanimous sentencing jury; or 5) no death-qualification at all.

Buchanan also insists that due process was denied because without question there are fair-cross section, equal protection, and even First Amendment, ramifications from excusing 20% of the jurors due to their viewpoint on a controversial topic irrelevant to *this* defendant's case. Even if it is held that the excluded group is not sufficiently "distinct" to satisfy *McCree's* exacting standards, a large and important cross-section of the community was excluded from jury service in an American

courtroom. The overall extent of the fundamental unfairness must be recognized by the due process clause, even if each theory is rejected as separate, compartmentalized constitutional violations. This jury's age, racial, sexual and political orientation was demonstrably tilted by death-qualification.

Even if the practice is acceptable in a multi-defendant case such as this, the death-qualifying process employed below still offended due process. While 20% of the panel was excluded because of views on a punishment irrelevant to Buchanan, no voir dire was permitted on lesser, applicable penalties. No probing, thus no disqualification for cause or by right, was permitted on partiality toward the death penalty (life-qualification). Veniremembers were excused without stating they would not follow the law in violation of the limits set by *Witherspoon*, *Adams* and *Witt*. In the end, the jury itself was biased on both guilt and sentencing by this dramatic emphasis on the death penalty.

II. State's Use Of Competency Evaluation At Trial

Petitioner's argument that the State should not be allowed to use a competency evaluation to rebut a mental status defense is twofold: first, petitioner submits that *any* trial use by the State of a competency evaluation is fundamentally unfair since competency evaluations can be compelled, and further, are irrelevant to the issues presented by mental defenses; second, the unwarned use of a competency evaluation denies a criminal defendant the Fifth Amendment privilege to be free from self-incrimination, and denies the Sixth Amendment right to consult with counsel.

At trial, petitioner argued that he could not be guilty of any degree of homicide because he did not participate in the murder of the victim. Alternatively, petitioner argued that if the jury were to believe that he did participate in the murder (as they obviously did, having convicted him of intentional murder), then he could only be guilty of Manslaughter in the First Degree. In Kentucky, the crime of murder is distinguished from the crime of Manslaughter in the First Degree depending upon the presence or absence of emotional disturbance of the

perpetrator. In petitioner's case, he presented as his only defense witness a social worker who testified from records of the Commonwealth of Kentucky that petitioner was emotionally disturbed, exhibited thought disorders, and that some 4-1/2 months prior to the charged offenses, was pre-psychotic. Petitioner presented no evidence of a psychological or psychiatric nature which was obtained after the offenses were committed. Instead, petitioner relied solely upon records already existing at the time of the offense, having been obtained by the Commonwealth during petitioner's treatment as a delinquent juvenile.

The trial court, over petitioner's objection, allowed the prosecutor to use the report of a psychiatrist who evaluated petitioner pursuant to an order of the Juvenile Court for a competency evaluation. Petitioner was not advised that the State would make any trial use of the statements made to the psychiatrist. Nor was he informed that the psychiatrist's clinical observations or opinions might be used against him.

Clearly, evaluations of competency are fundamentally different than evaluations of a criminal defendant's mental state at the time of the offense. Competency evaluations work merely to protect the incompetent defendant from being tried, and consequently maintain the integrity of the criminal justice system. The test for competency is significantly different than the test of insanity. In fact, defendants who might otherwise be insane may be competent to stand trial.

Petitioner submits that to allow the use of competency evaluations by the State to rebut mental status defenses will ultimately pervert the due process considerations for the determination of competency, and may ultimately work to obstruct competency determinations in the first instance.

Further, petitioner submits that the unwarned use of a competency evaluation during the guilt/innocence phase of a criminal trial violates the defendant's Fifth Amendment privilege to be free from compelled testimony and his Sixth Amendment right to assistance of counsel.

ARGUMENTS

I.

PURGING 20% OF THE JURY PANEL (7 FOR CAUSE, 4 BY PEREMPTORY) DUE TO RELIGIOUS OR POLITICAL VIEWS ON CAPITAL PUNISHMENT VIOLATES THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS WHEN ONE DEFENDANT IN A JOINT TRIAL DOES NOT FACE THE DEATH PENALTY.

Petitioner will not repeat the excellent submissions by respondent and amici in *Lockhart* v. *McCree*, 106 S.Ct. 1758 (1986), either as to analysis of precedent or discussion of social science literature on the general subjects of death-qualification and "conviction-proneness."[28] *McCree*, however, is the jumping off point not the end point for this case.

A. *McCree*

Unlike *McCree*, this case does not involve the possibility that the veniremembers in question "might frustrate administration of a state's death penalty scheme," *Wainwright* v. *Witt*, 105 S.Ct. 844, 848, 851 (1985). Nor does this action involve "that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties . . ." *Witt*, 105 S.Ct. at 852, since the capital punishment attitudes of the venire were wholly irrelevant to Buchanan's case and since the trial court's summary exclusion procedure, coupled with the prosecutor's peremptory challenges, created a significant danger that the "class" was expanded beyond the narrow confines of *Witherspoon/Witt*. Nor does Buchanan argue "the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions . . ." *Lockett* v. *Ohio*, 98 S.Ct. 2954, 2960 (1978), since those excluded where fully qualified as to his case.

[28] Available to the Court and incorporated here, to the extent relevant, are the briefs and summaries of social science studies in the *McCree* appendix.

Unlike *Mccree*, Buchanan's claim does not rise and fall on "conviction-proneness."[29] Nor does he depend on presenting conclusive proof[30]—using actual jury deliberations.[31] Unlike *McCree*, the state interest here is slight—if it exists at all. The holding in *McCree*, 106 S.Ct. at 1764, was that "the Constitution does not prohibit . . . 'death-qualifying' juries in capital cases." Buchanan's was not a capital case.

B. Burden Of Proof

Assuming *arguendo* there are "serious flaws in the evidence[32] . . . that 'death-qualification' produces 'conviction--

[29] "In a large sense, death-qualification may have more to do with wrongful prison terms than with wrongful executions." That is so because "[i]t is plausible that juror characteristics can be particularly influential when juries are asked to distinguish among the lesser forms of homicide." Finch and Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB.LAW. REV. 21, 61 (1986).

[30] The Court's "serious doubts about the value of . . . studies in predicting the behavior of actual jurors" must be read in the context of the "per se constitutional rule" sought by McCree. Surely, the Court's reliance on social science as an adjunct to judicial experience and common sense is firmly entrenched. *See Williams* v. *Florida*, 399 U.S. 78 (1970); *Colgrove* v. *Battin*, 413 U.S. 149, 160 n.15 (1973); *Ballew* v. *Georgia*, 435 U.S. 223 (1978).

[31] *Fay* v. *New York*, 332 U.S. 261 (1947) presented the "blue ribbon jury" for review. This panel was screened for "all who possess . . . such conscientious opinions with regard to the death penalty as would preclude finding a defendant *guilty* . . ." 332 U.S. at 267-68. So-called "nullifiers," which is a much narrower class than at issue here, *McCree*, 106 S.Ct. at 1764, didn't serve on the special panel. Complaint about sex discrimination—only 11% were women—was said to be "almost frivolous." *Fay*, 332 U.S. at 266 n.4. "*A more serious allegation* against the special jury panel is that it is more inclined than the general panel to convict." 332 U.S. at 278. "Extensive studies" were made by "the New York State Judicial Council" which "indicate[d] that special juries are prone to convict. In a study of certain types of homicide cases, it found that in 1933 and 1934, special juries convicted in eighty-three and eighty-two percent of the cases while ordinary juries . . . convicted in forty-three and thirty-seven percent respectively." 332 U.S. at 278, 279.

[32] It is not without significance that this Court, and others who have studied the issue, have not rejected out-of-hand the unquestionably impressive array of social science studies. *See, e.g.*, *Hovey* v. *Superior Court*, 616 P.2d 1301, 1341 (Cal. 1980) ["Most of the criticisms do not have merit."]. Nor does *McCree*, 106 S.Ct. at 1764 n.11, seriously dispute the " 'essen-

prone' juries," *McCree*, 106 S.Ct. at 1762, petitioner still must prevail. While the empirical evidence may not be sufficient to bar the practice in prosecutions where it is essential, surely the social science data, buttressed by "the more intuitive judgments of . . . judges,[33] defense attorneys, and prosecutors,"[34] is enough to carry the day in a non-capital case.

"In light of the presently available information," this Court is "not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction" by a death-qualified jury.

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tial unanimity' of support among social science researchers and other academics for McCree's assertion that 'death-qualification' has a significant effect on the outcome of jury deliberations at the guilt phase of capital trials," (quoting the dissent, 106 S.Ct. at 1773). "[T]here are no studies which contradict" the empirical records developed in *Hovey*, *McCree* and *Keeton* v. *Garrison*, 578 F.Supp. 1164, 1171-79, *rev'd*, 742 F.2d 129 (4th Cir. 1984), *cert. denied*, 106 S.Ct. 2258 (1986). *See Grigsby* v. *Mabry*, 758 F.2d 226, 238 (8th Cir. 1985) *(en banc), rev'd, McCree*. This remains true.

One study not discussed in *McCree* is Bray and Noble, *Authoritarianism and Decisions of Mock Juries*, 36 JOUR. PERSONALITY & SOCIAL PSYCHOLOGY 1424 (1978) [Bray and Noble]. 280 students were divided into 6 member juries and categorized as high or low authoritarians. They listened to an audio-recording of a murder trial, made initial judgments, deliberated, and then announced verdicts. As other researchers discussed in Sec. C(ii) *infra*, Bray and Noble, at 1429, found "greater endorsement of the death penalty by high authoritarians." More importantly, again social science found that these jurors (high authoritarians) and juries "reached guilty verdicts more frequently." *Id.* at 1.

[33] The trial judge implied there are "prosecution-prone" jurors. In limiting each defendant to 5 peremptory challenges he said "there isn't . . . any inconsistency in the type of juror that [each defendant] would want" to strike [TH 3/9/82, 23].

[34] Recent studies have shown that "veteran" jury panels—those who have served in other cases—may perceive fundamental principles of law (i.e., presumption of innocence) differently from jury panels composed of citizens who have never served. Additionally, "[t]he results indicated that as the number of jurors with prior jury service increased there was a modest, but significant, increase in the probability of conviction." Dillehay and Nietzel, *Juror Experience and Jury Verdicts*, 9 LAW HUM. BEHAV. 179 (1985).

Buchanan objected to a panel "who has become prosecution oriented" by their length of service [TH 12/18/81, 36]. Nevertheless, most of the jurors called were on their very last day of jury service. Once again, social science demonstrates what trial lawyers and judges know from experience. The prosecutor below candidly admitted: "I would rather have [a juror] who has more experience. You get a brand new jury and . . . you say reasonable doubt and *everybody panics and gets hung up*" [TH 12/18/81, 37].

Witherspoon v. *Illinois*, 391 U.S. 510, 518 (1968). "It does not follow, however, that . . . petitioner is entitled to no relief" because there is no reason he should be held to such a high burden of proof. *Witherspoon*, 391 U.S. at 518. Since we seek so much less than McCree, we should be held to a lesser burden. *See generally Hovey*, 616 P.2d at 1308 n.37 ["substantial doubt" must be shown whether a death-qualified jury is neutral]. Second, Buchanan has certainly established a prima facie case, calling for rebuttal evidence from the State. *Cf. Castaneda* v. *Partida*, 430 U.S. 482, 498 (1977). Third, and most important, since there was little or no state interest in death-qualifying petitioner's jury, the Commonwealth must bear the burden of justifying the exclusion *and* of demonstrating lack of prejudice.[35]

C. Social Science Research

The death-qualified[36] are not just more prone to convict, as was the focus in *McCree*. Death-qualified jurors also share a "cluster" of pro-prosecution, anti-accused values—some of which are directly relevant to this case and not specifically in issue in *McCree*. *See, e.g.*, 106 S.Ct. at 1778 (Marshall J., dissenting). Principal among the findings, and crucial to Buchanan's argument—is that death-qualified juries tend to

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[35] Even "assuming . . . it is not currently possible to prove or disprove a relationship between death-qualification and prejudice" as to "conviction-proneness," and *McCree*, 106 S.Ct. at 1764 ["we will assume . . ."], did not go so far, "we choose the victor when we assign the burden of proof." Gillers, *Essay Review: Proving The Prejudice of Death-Qualified Juries After Adams* v. *Texas*, 47 U.PITT.L.REV. 219, 240 (1985). Since Buchanan did not face the death penalty, why should he have this burden?

[36] Existing research compares jurors who would be excused under the *Witherspoon* test (unwilling to impose a death sentence in *any* case) with other jurors. This research "may actually *understate* the magnitude of the problem raised by death qualification." Finch and Ferraro, at 62-63. "Contemporary research on death qualification is based on a study group defined more narrowly than in practice or, after *Witt*, as a matter of law." This is certainly true here because even if the exclusion met the *Witherspoon* standard, the prosecutor's peremptory strikes may legitimately be considered. See note 50.

give more harsh sentences than *Witherspoon*-excludables [WE's].[37]

i. Punitiveness and Pro-Death Penalty Views

Researchers have consistently and without exception found proponents of the death penalty more *punitive* than opponents. Wilson, *Belief in Capital Punishment and Jury Performance*, (unpublished, University of Texas)(1964) [Wilson]; Jurow, *New Data on the Effects of a "Death-Qualified" Jury on The Guilt Determination Process*, 84 HAR.L.REV. 657 (1971) [Jurow]; Fitzgerald and Ellsworth, *Due Process vs. Crime Control: Death-Qualification and Jury Attitudes*, 8 LAW HUM. BEHAV. 31 (1984) [Fitzgerald and Ellsworth]. "Death-qualified respondents were more punitive than excludable respondents—less likely to consider mercy, more likely to favor harsh punishment as a means of reducing crime, and more likely to believe in the strict enforcement of all laws, no matter what the consequences. These differences are dramatic." Fitzgerald and Ellsworth at 43-44.

ii. Authoritarianism And Pro-Death Penalty Views

Significantly, jurors who favor the death penalty tend to be more "authoritarian" than capital punishment opponents. "The more a subject is in favor of capital punishment, the more likely he is to be politically conservative, authoritarian and punitive in assigning penalties upon conviction." Jurow at 588. "A considerable body of research conducted since *Witherspoon* indicates that individuals who favor the death penalty have correlated attitudes which may bias them toward the prosecution. One such attitude, 'authoritarianism,' is characterized by conservatism, rigidity, moralism, punitiveness, intolerance of deviant behavior, and hostility toward low-status persons." Seguin and Horowitz, *The Effects of 'Death Qualification' on Juror and Jury Decisioning, An Analysis From Three Perspectives*, 8 LAW & PSYCHOLOGY REV. 49, 61 (1984). While the best predictor of voting severity (higher degree of offense)

[37] This proposition seems so obvious as to not need confirmation by social science. "[I]t is self evident . . ." *Witherspoon*, 391 U.S. at 518.

on the first ballot was a favorable attitude toward the death penalty, the legal authoritarianism score from Boehm's (1968) Legal Attitudes Questionnaire[38] also correlated with more severe first ballot votes. Cowan, Thompson, and Ellsworth, *The Effects of Death-Qualification on Jurors Predisposition to Convict and on the Quality of Deliberation*, 8 LAW HUM. BEHAV. 53, 69 (1984) [Cowan—deliberation]. "These two attitudes were highly intercorrelated (4 = .46, p.2.001)."

iii. Authoritarianism And Punitiveness

Researchers have repeatedly and consistently concluded that high authoritarians mete out more severe punishments than low authoritarians. Berg and Vidimar, *Authoritarianism and Recall of Evidence about Criminal Behavior*, 9 JOUR. OF RESEARCH & PERSONALITY 147, 151-152 (1975) [Berg and Vidimar]; McAbee and Cafferty, *Degree of Prescribed Punishment as a Function of Subjects Authoritarianism and Offenders Race and Social Status*, 50 PSYCHOLOGICAL REPORTS 651-654 (1982); Bray and Noble, 36 JOUR. PERSONALITY & SOCIAL PSYCH. at 1427 ["High authoritarians gave significantly longer sentences than low authoritarians."]; Mitchell and Byrne, *The Defendants Dilemma: Effects of Juror Attitudes and Authoritarianism on Judicial Decisions*, 25 JOUR. PERSONALITY 7 SOCIAL PSYCH. 123, 125-126 (1972).

iv. Authoritarianism And Dissimilar Defendants

Aside from their punitiveness, high authoritarians behave in other ways disturbing to all concerned about the fairness of our criminal justice system. They do not follow instructions to disregard evidence about the defendant's character. Mitchell and Byrne. In fact they are more inclined to punish severely when the defendant is dissimilar to themselves or has a perceived "bad character." Mitchell and Byrne. High authoritarians tend to base their verdicts on subjective impres-

[38] Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 3 WISC. L. REV. 734, 739-742 (1968) [Boehm].

sions of the defendant's character. Boehm at 746. Particularly relevant here is the finding that "high authoritarians are prone to place personal blame on juvenile delinquents and minimize the role of other contributing factors." Centers, Shomer, and Rodrigues (1970), cited in Berg and Vidmar at 148.[39] "It appears clear that high authoritarians, more often than low authoritarians, tend to respond with personal hostility to low status figures . . ." Roberts and Jessor, *Authoritarianism, Punitiveness and Perceived Social Status*, 56 JOUR. OF ABNORMAL & SOCIAL PSYCHOLOGY 311, 314 (1958). Berg and Vidimar also found that high authoritarians are more punitive to "low status" defendants. Unfortunately, David Buchanan falls into this category.

v. Authoritarianism And Mental-State Defenses

A critical area where the views of pro-death penalty jurors differ substantially from those of the death-scrupled is perspective on the insanity defense, and, by analogy, the type of mental state mitigation defense offered here. Early on Wilson found death penalty proponents more likely to reject the insanity defense. The 1971 Louis Harris and Associates poll found significantly more jurors who favored capital punishment mistrusted the insanity defense. And a recent study found death-scrupled jurors significantly more likely to vote not guilty by reason of insanity than were the death penalty proponents when the defense was psychologically based.[40] Ellsworth, Bukaty, Cowan, and Thompson, *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW HUM. BEHAV. 81, 88-89 (1984). Jurors favoring the death penalty are much more likely to believe most defendants who plead not guilty by reason of insanity are not "really" insane. *Id.* at 89.

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[39] One study suggests a desire to avoid "anxiety laden situations . . . may steer authoritarian juries away from dealing with some important issues." Goldman, Freundlich and Casey, *Jury Emotional and Deliberation Style*, JOUR. PSYCHIATRY & LAW 319 (Fall 1983).

[40] Interestingly, there were no significant differences when organicity was the premise for the defense.

vi. Miscellaneous Views Of Death Penalty Supporters

Those inclined toward capital punishment are significantly predisposed to evaluate evidence more favorably to the prosecution. Thompson, Cowan, Ellsworth, and Harrington, *Death Penalty Attitudes and Conviction Proneness*, 8 LAW HUM. BEHAV. 95, 104 (1984). Moreover, the death-scrupled are more regretful than death penalty proponents for harsh errors in convicting when acquittal was appropriate or finding a higher degree of offense than was warranted. *Id.* at 107. On the other hand, the death-scrupled are less regretful for lenient errors. If these studies prove anything, it is that "a community made up exclusively of" the death-qualified "is different from a community composed of both . . ." *Ballard* v. *United States*, 329 U.S. 187, 193 (1946).

D. Impartial Jury

Unless *Witherspoon* and *Adams* v. *Texas*, 448 U.S. 38 (1980) are to be wholly repudiated, Buchanan was denied his right to an impartial jury. U.S. CONST., 6th AMEND. Even if it "has not been shown that this jury was biased with respect to . . . guilt . . .[41] [I]t is self-evident that, in its role as arbiter of . . . punishment . . . this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Witherspoon*, 391 U.S. at 518.

Witherspoon involved a state procedure for selecting jurors in capital cases, where the jury did the sentencing and had comlete discretion . . ." *Adams*, 448 U.S. at 43. The same is true here, even though death was not a possible punishment. As in *Witherspoon*, "the jury assessed punishment at the same time it renders its verdict . . ." and had "unfettered discretion" in sentencing. *Adams*, 448 U.S. at 46. *Adams'* reaffirmation of *Witherspoon* was in a different context, where "the jury plays a somewhat more limited role . . ." one of "guided jury discretion." 448 U.S. at 47. Buchanan's jury had unbridled freedom in

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[41] Considering the empirical evidence of "conviction-proneness," in general, and this jury's actions in particular, Buchanan can not and does not concede this.

sentencing and, in this sense, his case is closer to Witherspoon's than Adams'.

The degree of jury discretion is relevant because *McCree* dictates so. McCree's criticism of death-qualification ultimately failed because "both *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion . . ." was wider than it is in the determination of guilt and innocence. 106 S.Ct. at 1769. "[T]he traditional role of finding the facts and determining guilt or innocence . . . is more channelled." 106 S.Ct. at 1770. Therefore, the fatal flaw in McCree's case is precisely Buchanan's strength. "*Witherspoon* is not grounded in the Eighth Amendment . . . but in the Sixth Amendment. *Witt*, 105 S.Ct. at 852. Death-qualification most certainly "stacked the deck against the petitioner" exactly as meant by *Witherspoon*—on punishment. 391 U.S. at 523.

E. State Interest

Witherspoon immediately turned to the State's "justification . . . offered for the jury-selection technique it employed . . .", 391 U.S. at 518, as did *McCree* ultimately. 106 S.Ct. at 1768. The *McCree* Court posited three reasons why the state's valid interest outweighed any countervailing considerations recognized by *Witherspoon* and *Adams*. Only the first of these is arguably relevant:[42] "a single jury that could impartially decide all of the issues *in McCree's case*." 106 S.Ct. at 1768. Here the state's interest is much less. Rather than providing two juries in every capital case, Kentucky would, at worst, have to permit one separate trial for a non-capital co-defendant every few years.[43]

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[42] Buchanan had nothing to gain from "residual doubt," even if it existed, at the penalty phase since there was to be no bifurcated trial in his case. 106 S.Ct. at 1769. Nor is "consistency" a concern here. *Id.*

[43] The Department of Public Advocacy routinely provides extensive homicide date to the Kentucky Supreme Court in capital appeals as part of a challenge to the application of the death penalty statute and for use in proportionality review. While not of record here, the Attorney General is aware of this public information. There are, therefore, known to the Attorney General, *at least* 36 defendants who have received the death penalty, 61 who have received a lesser sentence after a penalty phase, and 23 others who have been convicted of manslaughter. Some of these cases involved joint trials. All

Theoretically, if Buchanan were to prevail, any decision would apply to those instances where the prosecutor "will request the death penalty in particular cases *solely* . . . [to] 'death-qualif[y]' the jury" only to waive the death penalty at the presentence hearing.[44] 106 S.Ct. at 1766 n.16. Putting aside the problems of proof, 106 S.Ct. at 1772 n.4 (dissent), hopefully such cases are rare.

Petitioner prays that the minimal expense of requiring some alternative procedure in these infringement situations not be held to outweigh the compelling case of prejudice he presents both in theory and in fact. Death-qualification, *in this case*, "sufficiently threatens . . . constitutional principles . . . that any countervailing interest of the State should yield." *Burch* v. *Louisiana*, 441 U.S. 130, 136 (1979). The alternatives are many and could have "accommodate[d] the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths" as to *both* Buchanan and Stanford at little additional cost. *Adams*, 448 U.S. at 44.

First, and most obvious, a separate trial could have been granted. Separate trials are not unusual in other multi-defendant cases where constitutional rights are in danger.[45] *See Peo-*

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of the juries were death-qualified. To petitioner's knowledge, not a single capital case, other than this one, involved a co-defendant who was not "death-eligible." The reason is quite simply that, for other reasons, separate trials are granted or, much more likely, the less culpable co-defendants usually plead guilty. Respondent is free to point the Court to similar cases.

[44] This certainly occurs. *State* v. *Mercer*, 618 S.W.2d 1, 17 (Mo. 1981) (Seiler, J. dissenting) [discussing two such cases]. In at least three Kentucky cases prosecutors have "death-qualified" juries, obtained a conviction and dropped their request for the death penalty. *Commonwealth* v. *Whittinghill* (Muhlenberg Co. Ind. No. 82-CR-027) ["Man pleads guilty to murder charge," Lexington *Herald-Leader* at B2 (10-16-83)]; *Commonwealth* v. *Pennington* (Letcher Co. Ind. No. 84-CR-023) ["Pennington to serve at least 25 years," *The Mountain Eagle* at 1 (May 29, 1985)]; *Commonwealth* v. *Wilson* (Jefferson Co. Ind. No. 84-CR-1521), appeal pending. *See* also *Hicks* v. *State*, 414 So.2d 1137 (Fla.App. 1982); *Nettles* v. *State*, 720 (1966), *cert. dis. as improvidently granted*, 392 U.S. 616 (1967).

[45] It may well have been in the Commonwealth's interest to grant separate trials in this case for other reasons—because the defenses of Buchanan and Stanford were directly in conflict and because there were serious *Bruton* v. *United States*, 391 U.S. 340 (1968) problems when neither defendant testified

ple v. *Clark*, 402 P.2d 856 (Cal. 1965) [violation of speedy trial rights of one defendant not justified by need for joint capital trial].

Second, the analogous relief of a separate sentencing jury was requested. This would have conserved some time and expense as the guilt phase evidence need not have been repeated in full. The initial voir dire would have taken one-fourth the time. *McCree*, 106 S.Ct. at 1781 (dissent). Third, Buchanan asked, and the judge considered, death-qualification only after the guilt phase—with substitution of alternates[46] should any WE's be present on the guilt-finding jury assuming a conviction of intentional murder.

Fourth and fifth, if Stanford had been willing to waive jury unanimity in recommending punishment, or a 12 person jury for capital sentencing, Buchanan's interests could have been protected without any cost to the state.[47] Sixth, the most

but various confessions and admissions were introduced.

For example, in closing, Buchanan's counsel went after Stanford's "indignant" argument that Kevin was "set up" presumably by Buchanan. "It's not very indignant to brag and boast and laugh about sodomy" like Stanford did [TE 1289]. Again and again: "Who laughed about sodomizing the victim . . ." [TE 1294].

Without detailing the facts surrounding the *Bruton* issues, suffice it to say the prosecution may have endangered its case by insisting on a joint trial. *See, e.g., Byrd* v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970).

[46] The dissent in *McCree*, 106 S.Ct. at 1781, suggests this alternative. In *Peek* v. *Kemp*, 784 F.2d 1479 (1984) (*en banc*), the Eleventh Circuit upheld a death sentence where an alternate was substituted for a juror who allegedly was unable to continue in the midst of the penalty deliberations. In *Toole* v. *State*, 479 So.2d 731, 735 (Fla. 1985), the trial judge used exactly this procedure and the prosecutor had no trouble obtaining a death sentence.

[47] *Spaziano* v. *Florida*, 104 S.Ct. 3154 (1984), *Williams* v. *Florida*, 399 U.S. 78 (1970) and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), indicate that Kentucky could simply employ a jury of less than 12 or non-unanimous jury (as in Florida) for the sentencing portion of a bifurcated captial trial. KY. REV. STAT. [KRS] 532.025(1)(b) requires the jury "to recommend a sentence." There is no reason why this recommendation must be by 12—or all 12. If so, any "death-qualification" could occur *after* the guilt phase of a joint capital/non-capital trial such as this with no additional time or expense involved—indeed less: 12 instead of 46 interviews. Alternatively, with a non-unanimous jury, there seems no need for death-qualification at all.

On the other hand, if the capital defendant would waive a 12 member jury or a unanimous jury for sentencing, thereby avoiding death-qualification pre-

logical alternative, at little additional expense, would be to empanel simultaneous juries.[48] Finally, the state is always free not to death-qualify the jury at all.[49] As in *Ballew* v. *Georgia*, 435 U.S. 223, 243-244 (1978), the state's interest in saving "court time and . . . financial costs" is insufficient to outweigh the obvious prejudice in being tried before a death-qualified jury—even if such juries are only "somewhat" more likely to convict and punish severely than non-capital juries. *McCree*, 106 S.Ct. at 1764.

F. Fair Cross-Section

Buchanan's jury was, in attitude toward punishment (and a constellation of other criminal justice concepts) "unlike one chosen at random from a cross-section of the community . . ." *Witherspoon*, 391 U.S. at 517. A jury which is unnecessarily "culled of all who harbor doubts about the wisdom of capital punishment,"[50] 391 U.S. at 520, lacks the "common-sense judg-

guilt phase for his own case, no change in procedure would be required. *See Patton* v. *United States*, 281 U.S. 276, 293 (1930); *Short* v. *Commonwealth*, 519 S.W.2d 828 (Ky. 1975) [wavier of 12 person jury or unanimity possible]; *Ward* v. *Hurst*, 189 S.W.2d 594 (Ky. 1945) [no KY. CONST. right to jury on punishment].

[48] The "double jury procedure" is an effective and widely used "economy measure" which unquestionably upholds the due process rights of both defendants. *Smith* v. *DeRoberts*, 758 F.2d 1151 (7th Cir. 1985); *United States* v. *Lewis*, 716 F.2d 16, 19 (D.C. Cir. 1983); *United States* v. *Hayes*, 676 F.2d 1359, 1366 (11th Cir. 1982); *United States* v. *Rimar*, 558 F.2d 1271 (6th Cir. 1977); *United States* v. *Sidmon*, 470 F.2d 1158, 1167-70 (9th Cir. 1972). The only additional time would be spent in jury selection—and that would be shortened by keeping WE's for the non-capital panel.

[49] Some states operate capital punishment schemes without death-qualification. *See State* v. *Lee*, 60 N.W. 119 (Iowa 1894); *State* v. *Wilson*, 11 N.W.2d 737 (Iowa 1943); *State* v. *Garrington*, 76 N.W. 326 (S.D. 1898).

[50] It is legitimate to consider the prosecutor's peremptory strikes, to the extent (4 of 6) they can be linked to hesitation regarding the death penalty, because were it not for the joint trial, the Commonwealth would have had no opportunity to find out what the veniremembers views were—and therefore no opportunity to exclude these jurors either for cause *or by peremptory challenge*. *Cf. Batson* v. *Kentucky*, 106 S.Ct. 1712 (1986); *Harich* v. *Wainwright*, 106 S.Ct. 1092 (1986) (stay denied) (Powell J., concurring) ["The *Lockhart* issue was at least arguably presented when persons on the venire who expressed reservations . . . were removed by peremptory challenge."];

ment" and "public confidence" which comes from full "community participation" and "shared responsibility" essential to "group determination" of punishment. *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *McCree*, 106 S.Ct. at 1765, quoting *Taylor* v. *Louisiana*, 419 U.S. 522, 530-31 (1975).

There is no doubt that *Witherspoon*, in relying on the "cross-section" aspects of the problem, 391 U.S. at 519-521, recognized that death-scrupled citizens are a part of the community, a "broad categor[y] of persons", which must be represented on juries and not systematically swept from either the jury pool or panel.[51] *Duren* v. *Missouri*, 439 U.S. 357, 370 (1979); *Taylor*, 419 U.S. at 533-35. Petitioner's claim may not be based on so obvious a characteristic as skin color or sex. Nevertheless, what is in issue is a definable characteristic which, in a non-racist and non-sexist democratic society, is the most important of all—how a citizen thinks and feels about important issues. "[F]rom time to time other differences from the community norm may define other groups which need the same protection." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). Buchanan can prove what other cross-section cases can only assume—the presence of the excluded group can make a difference in the jury room.

Perhaps more important for conventional cross-section analysis, this exclusion process demonstrably changes the sexual, racial, age and political makeup of juries—and did so in this

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Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH.L.REV. 1 (1981); *Crawford* v. *Bounds*, 395 F.2d 297, 301 (4th Cir. 1968); *McCree*, 106 S.Ct. at 1773-74 (dissent). Indeed, the "true impact of death-qualification . . . is . . . more devastating than the studies show . . ." at least in this case.

[51] If the exclusion is systematic, it seems to matter little whether it takes place before or after the names are placed in the drum. *McCree*, 106 S.Ct. at 1775 n.6 (dissent); *compare Fay*, 322 U.S. at 267-68, where the death-qualification was done before the jury panel was assigned to a particular courtroom. *See also People* v. *Fain*, 451 P.2d 65, 73 (Cal. 1969) [pre-screening jurors for views on death penalty].

case:[52] modestly as to sex but significantly as to race, age and

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[52] The Jefferson County, Kentucky, Clerk's Voter Registration Books reveal the race, sex, age and political party of the veniremembers excluded for cause, by peremptory and the actual jurors in this case:

a. Challenges For Cause

JUROR NO.	NAME	RACE	SEX	AGE AT TRIAL	PARTY
#192	Della Aspatore	W	F	65	Dem.
#124	David Cain	W	M	43	Dem.
#105	David Ehman	W	M	19	Dem.
#167	Sharon Englert	W	F	23	Dem.
#111	Belinda Roundtree	B	F	28	Ind.
#112	Louise Sebrey	W	F	56	Dem.
# 71	John Frye	B	M	38	Dem.
	b. Commonwealth Peremptory Strikes				
#145	Denise Cockerel	W	F	20	Dem.
#187	Amelda Kargl	W	F	49	Rep.
#135	James Roden	W	M	19	Dem.
# 70	Louise Williams	W	M	29	Rep.
	c. Jury				
# 26	Charles Kelly	W	M	52	Ind.
#193	Charles Cornish (foreman)	W	M	40	Rep.
# 73	Alice Eichenberger	W	F	55	Dem.
# 80	Franklin Sabol	W	M	39	Rep.
# 36	Robert Sands	W	M	60	Rep.
#128	Ethel Zimmerer	W	F	64	Dem.
# 38	Warren Adkins, Jr.	W	M	54	Dem.
# 81	Mary Mitchell	W	F	28	Dem.
# 46	Mary Quaife	W	F	58	Rep.
# 63	Donald Black	W	M	26	Dem.
#141	Donald Romans	W	M	32	Rep.
#182	Hazel Miles	W	F	49	Dem.

A majority of those excluded were women (6 of 11), young—under 30 (6 of 11) and overwhelmingly Democrats (8 of 11). More significantly, two blacks, who might have otherwise served on this all white jury, were eliminated. The actual jury was slightly less female (5 of 12), dramatically less young (2 of 12) and less Democratic (6 of 12) than it would have been but for death-qualification.

This microcosm of death-qualification appears to accurately reflect what the social scientists tell us. "Among the members of this excludable class are a disproportionate number of blacks and women," *McCree*, 106 S.Ct. at 1772 (dissent), as well as young people and Democrats. There is "evidence *of a strong political coloration* . . . Democrats favor capital punishment by a 2-to-1 margin while among Republicans support reaches 7-to-1 . . ." Gallup, THE GALLUP POLL (March 3, 1986).

political party. *Ballew's*, 435 U.S. at 237, concern for the "minority viewpoint", in a political sense, and "representation of minority groups", in a racial sense, is implicated here. "[C]ounterbalancing of various biases is *critical* to the accurate application of the common sense of the community . . ." 435 U.S. at 233-34. Wholesale exclusion of those "opposed to capital punishment" to one degree or another, "keeps an identifiable class of people off the jury . . ." and implicates "the established right of every criminal defendant to a jury drawn from a fair cross-section of the community." *Witt*, 105 S.Ct. at 861 (Brennan, J., dissenting).[53] "[S]ystematic . . . exclusion" of any "religious . . . [or] political . . . groups of the community" implicates the Sixth Amendment right to "an impartial jury drawn from a cross-section of the community." *Thiel* v. *So.Pac.Co.*, 328 U.S. 217, 220 (1946) [error to excuse day laborers].

G. Freedom Of Speech And Religion

McCree recognizes the legitimate "right as citizens" veniremembers have in not being unnecessarily excluded from criminal jury service. "[T]he removal for cause of [WE's] . . . *in capital cases* does not prevent them from serving . . . in other criminal cases . . ." There is no "substantial[54] deprivation of

[53] *McCree*, 106 S.Ct. at 1765, does not control because this case does not involve a "group defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . ." As to Buchanan, WE's "were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors . . ."

[54] Petitioner must respectfully disagree. Jurors in capital cases play significantly greater role in the criminal justice system than jurors in non-capital cases. The power of life and death over a fellow citizen is not the only difference. Capital trial jurors command the attention of the public and speak with authority, sometimes, on important issues in the criminal justice system. Recently, capital trial jurors led a successful fight to change Kentucky Criminal Procedure. "After emotional testimony from [seven] jurors in [a capital] murder trial, a House committee . . . approved a bill to allow juries to be told about a defendant's criminal record and parole eligibility before they recommend a sentence." Louisville *Courier Journal* at 1 (3/14/86). "Bill passed to get tough with criminals." Lexington *Herald-Leader* at B1 (3/22/86). These jurors help shape public opinion. They are perceived as spokespersons for the non-legal community. "2 say jury believed Taylor would kill again." Louisville *Times* at B1 (5/1/86).

their basic rights of citizenship" since they are "unable to follow the law . . ." 106 S.Ct. at 1766. *Cf. Batson*, 106 S.Ct. at 1724 ["discrimination against black *jurors*"]. Here, at least as to petitioner's case, the jurors in question were not unqualified. They had a constitutional right to serve. *Carter* v. *Jury Commission*, 396 U.S. 320 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970). While racial discrimination was not involved, except indirectly, constitutionally protected speech and religious beliefs were. Exclusion of citizens due solely to political or religious beliefs,[55] in this context, "is at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). *Cf. Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

Participation of WE's in non-capital prosecutions is critically important to "preserving 'public confidence in the *fairness* of the criminal justice system'" and implementing the Court's "belief that 'sharing in the administration of justice is a phase of civic responsibility.'" *McCree*, 106 S.Ct. at 1765, *quoting Taylor*, 419 U.S. at 530-31.

H. Equal Protection

"[T]he evidence suggests that 'death-qualification' will disproportionately affect the representation of blacks on capital juries" *McCree*, 106 S.Ct. at 1779 (dissent). This is both true in theory, and in fact—at least in this case. Since this black defendant was ultimately tried by an all white jury, there are undeniable equal protection concerns at stake. While the discrimination may be indirect and perhaps not intentional, in contrast to *Batson*, it is equally unnecessary and similarly prejudicial. The reduction in minority representation has "con-

[55] *See Schowgurow* v. *State*, 213 A.2d 475 (Md. 1965) [Maryland constitutional provision requiring belief in God for jury service violated due process]; *Juarez* v. *State*, 277 S.W. 1091 (Tex. 1925) [exclusion of Roman Catholics from jury denied due process]; *Smith* v. *Sisters of Good Shepherd*, 87 S.W. 1083 (Ky. 1905) [no error in refusing to exclude Catholics from jury where defendant was a Catholic institution]; *State* v. *McCarthy*, 69 A. 1075, 1076 (N.J. 1908) ["fundamental principles" required dismissal of indictment by grand jury from which rival political faction excluded].

stitutional significance", especially where the defendant is black. *Ballew*, 435 U.S. at 239.

Aside from race, Buchanan is denied equal protection in the sense that he has been singled out for a joint trial before a less "favorable" jury [A 6]. "[A] discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be 'equal protection of the law.'" *Fay*, 332 U.S. at 285. Equal protection is also denied since the exclusion falls along party lines and strips a certain political viewpoint of their "right to vote" as jurors. *Cf. Karcher* v. *Daggett*, 462 U.S. 725, 746 (1983) (Stevens, J., concurring); *Carrington* v. *Rash*, 380 U.S. 89 (1965).

I. Due Process

Admittedly complaining about exclusion of a group not yet legally "cognizable" for "fair cross-section" purposes, Buchanan alternatively submits that the death-qualification in his case violated fundamental fairness and thus due process. Unlike women or Mexican-Americans, a "significant difference in viewpoint between those permitted to serve has been proved . . ." *Fay*, 332 U.S. at 291-92. In this sense, Buchanan presents a more compelling constitutional claim that must be recognized by due process.[56] "The nature of the classes excluded *was* . . . such as was likely to affect the conduct of the . . . jury . . ." *Rawlins* v. *Georgia*, 201 U.S. 638 (1906).

The second prong to this due process analysis is the concept of impartiality. "Long before this Court held" the Sixth Amendment Impartial Jury Clause applicable to the States, "it was well established that the Due Process Clause" protected the right to an impartial decisionmaker and against "circumstances that create the likelihood or the appearance of bias." *Peters* v. *Kiff*, 407 U.S. 493, 502, 503 (1972). *Cf.* pre-*Duncan*

[56] In this case, the exclusion raised more than "the *possibility* that the composition of juries would be arbitrarily skewed" in a way actually detrimental to criminal defendants. *McCree*, 106 S.Ct. at 1765.

cases: *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Turner* v. *Louisiana*, 379 U.S. 466 (1965). This "fundamental fairness" approach has been applied to jury selection practices that only raise the "potential for a conviction-prone jury." *Henson* v. *Wyrick*, 634 F.2d 1080, 1082, 1084 (8th Cir. 1980) [sheriff or his deputy picked bystander jurors]. The "unmistakable import" of pre-*Taylor* cases "is that due process and equal protection prohibit jury selection systems which are *likely* to result in biased or partial juries." *Taylor*, 419 U.S. at 540 (Rehnquist, J., dissenting). This is such a case.

J. Unconstitutional Death-Qualification Under Witherspoon/Adams/Witt

i) One-Sided Punishment Qualification

Jury selection is, in its essence, a "quest . . . for jurors who will conscientiously apply the law and find the facts . . ." *Witt*, 105 S.Ct. at 852. Thus, "death-qualification" is "no different from excluding jurors for innumerable other reasons which result in bias . . ." 105 S.Ct. at 855. Viewed in light of *Adams* and *Witt*, "death-qualification" is a misnomer. If there is to be "punishment-qualification" it must be even-handed. The trial judge here asked only of the death penalty, rejecting tendered questions on the entire punishment range of 20 years to death.[57] Perhaps more important, he asked only of views opposed to the death penalty—not about extreme support for execution. The trial judge "crossed the line of neutrality" and "produced a jury uncommonly willing" to impose the maximum sentence for the highest degree of the offense. *Witherspoon*, 448 U.S. at 520, 521.

The trial court's anomalous approach, at least as to Buchanan, of qualifying the venire only on attitudes regarding an irrelevant punishment denied due process. "It is fundamentally unfair" for the state to employ such a potent, yet one-

[57] It seems reasonable to argue that as many jurors may be "substantially impaired" in their punishment function due to the 20 year option as are by the death option considering the facts of this case. *Witt*, 105 S.Ct. at 850.

sided, skewing procedure. *Cf. Wardius* v. *Oregon*, 412 U.S. 470, 475-76 (1973).

There is little doubt under *Witt* that veniremembers must be disqualified for views in favor of the death penalty[58]—as well as the opposite. "I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting . . . death . . ."[59] *Witherspoon*, 391 U.S. at 536 (Black, J., dissenting).

Prior to *Witherspoon*, the 4th Circuit recognized the unfairness of a one-sided qualification process. Each of the jurors in *Crawford* v. *Bounds*, 395 F.2d 297, 301 (4th Cir. 1968) (*en banc*) "professed a belief in capital punishment. Indeed, one . . . stated he believed . . . 'an eye for an eye', and that it would be his duty" to vote for death. *Id.* The 4th Circuit unanimously found "*a double standard of inquiry*" because the judge's questions did not focus on pro, as well as anti-death penalty views and held that the jury was selected in an "inherently unfair manner." 395 F.2d at 303. *See Hance* v. *Zant*, 696 F.2d 940, 956 (11th Cir. 1983) ["[T]he . . . [*Adams*] standard should apply to a veniremember in favor of the death penalty."]; *Pope* v. *United States*, 372 F.2d 710, 725 (8th Cir. 1967) (*en banc*) (Blackmun, J.) *vacated*, 392 U.S. 651 (1968) ["Among those excused . . . were three persons who indicated a tendency toward insistence on capital punishment, apart from other evidence . . ."]; *United States* v. *Puff*, 211 F.2d 171, 182 (2nd Cir. 1954) ["Nor

[58] Sixty-five years ago this Court said "it may well be" that a challenge for cause to a veniremember who was "in favor of nothing less than capital punishment" should have been sustained. *Stroud* v. *United States*, 251 U.S. 15, 20-21 (1919).

[59] Yet, how are we to know unless we ask questions? Little can be gleaned from the uniform "no" answers to the trial judge's single inquiry—except in a few cases where the juror's response implied, perhaps, some degree of enthusiasm. "I could render a death sentence" [TE 97]. "I do not object to the death penalty;" and later "I think it is a very serious crime" [TE 127, 128]. No "difficulties with that" [TE 222]. "I did on one case one time" [TE 164]. A recent Media General—Associated Press poll found that 27% of the public indicated the death penalty should be used in *all* murder cases. Lexington *Herald-Leader* A2(1/29/85). *Adams*, 448 U.S. at 50, suggests otherwise. At any rate, the "question is not one of statistical parity, but of logical consistency." 448 U.S. at 55 (Rehnquist, J., dissenting).

was the selection of the jury unfair in that only those with scruples or bias *against* capital punishment were excused.]; *Patterson* v. *State*, 283 So.2d 212 (Va. 1981) [error to refuse questions designed to expose cause challenges to pro-death jurors]; *Poole* v. *State*, 194 So.2d 903, 905 (Fla. 1967) [voir dire on "mercy" required]; *Pierce* v. *State*, 604 So.2d 185 (Tex. Crim. App. 1980) [automatic death (ADP) juror should have been excused]; *O'Connell* v. *State*, 480 So.2d 1284, 1287 (Fla. 1986) [3 ADP's should have been excused].

ii) Refusal To Ask Whether The Excluded Veniremembers Could Follow The Law

"[I]t is entirely possible that a person who has a 'fixed opinion against' . . . capital punishment might nevertheless be perfectly able . . . to abide by existing law . . ." *Boulden* v. *Holman*, 394 U.S. 478, 483-484 (1969). "*It is important* to remember that not all who oppose the death penalty are subject to removal for cause . . . those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *McCree*, 106 S.Ct. at 1766.

Buchanan's venire never got a chance to "state clearly" their answer to this crucial question because the judge wouldn't ask whether they could "subordinate . . . personal views . . . [and] abide by [the] oath as a juror and to obey the law of the State . . ." *Witherspoon*, 391 U.S. at 514-15 n.7. *Cf. Turner* v. *Murray*, 106 S.Ct. 1683 (1986). *Compare Patton* v. *Yount*, 104 S.Ct. 2885, 2893 (1984) [Jurors with opinions on guilt could "lay aside . . . opinion[s] and render a verdict based on the evidence . . ." quoting *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961).]; *see* also *Murphy* v. *Florida*, 421 U.S. 794 (1975).[60] This failure

[60] Contrast the approach taken by the trial judge in "rehabilitating" a juror unfavorable to the defendant after she said she might have formed an opinion from pretrial publicity. THE COURT: "[I]f my instructions . . . [are] that you have to put out of your mind anything that you heard or read . . . could you do that?" [TE 128]. This is the uniform approach taken under Kentucky law to other issues. *See, e.g., Caldwell* v. *Commonwealth*, 634 S.W.2d 405, 407 (Ky. 1982) ["That is not the point. Can you lay aside . . ."].

seems fatal under McCree's impartiality analysis. 106 S.Ct. at 1767.

iii) "A Broader Basis"

As the abbreviated colloquies [A 29-37] indicate, there can be no assurance that the 7 jurors in question were not excluded on "'any broader basis' than inability to follow the law . . ." *Adams*, 448 U.S. at 49; *Witherspoon*, 391 U.S. at 522. No input from defense counsel was permitted.[61]

Of special concern is that the judge's two-part question focused on "this case." But "this case" involves a juvenile defendant. If the panel is to be purged of all those who have substantial qualms about executing children, we truely have a "hanging jury" in the *Witherspoon*, 391 U.S. at 523, sense. A juvenile's youth, after all, is his most powerful mitigating circumstance.[62]

iv) Process Effects

Death-qualification in this case could only have served to confuse and mislead the jury. Veniremember Cain: "Is that what this case is about . . .?" [A 31]. The approach taken by the trial judge did not distinguish between the defendants. The veniremembers could have only concluded that all this discussion of the death penalty applied equally to Buchanan. "There is considerable evidence that the very process of determining

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[61] The Court has often relied upon defense counsel's implicit satisfaction with a veniremember's allegedly ambiguous response. "Defense counsel did not . . . attempt rehabilitation." *Witt*, 105 S.Ct. at 848, 856. While this doesn't suggest defense input is constitutionally necessary, the judge should be held to a strict standard if he decides to "go it alone."

[62] Even follow up questions focused on "this case": "Do you think it would be . . . impossible for you to decide on the death penalty in this case?" [A 31]. In *Ice* v. *Commonwealth*, 667 S.W.2d 671, 676 (Ky. 1984), involving another juvenile defendant, "in this case" questions were condemned in an opinion joined by the trial judge, sitting as justice of the Kentucky Supreme Court. *See* also *Jaggers* v. *Commonwealth*, 439 S.W.2d 580 (Ky. 1968), *rev'd*, 403 U.S. 946 (1971) ["in this case" question].

Obviously, a veniremember's views can change depending on what "this" case is. *See*, for a sad example, *Owens* v. *Commonwealth*, 277 S.W. 304 (Ky. 1925) [Excused as death-scrupled in a white defendant case, the same juror votes for death for a black defendant two days later].

[who the WE's are] . . . predisposes jurors to convict." *McCree*, 106 S.Ct. at 1780 (dissent). *See* Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); *Hovey*, 616 P.2d at 1349.

CONCLUSION

Given the various constitutional rights at stake, it is difficult to fit all within a "single analytical umbrella."[63] *Peters* v. *Kiff*, 407 U.S. 493, 500 (1972). Petitioner suggests the Due Process Clause. Whatever constitutional handle one attaches to the problem presented by this case, one fact is clear. David Buchanan was prejudiced. He not only demonstrated "a substantial threat" to his basic rights, but a case-related denial of his "Sixth and Fourteenth Amendment rights to a fair jury trial." *Compare McCree*, 106 S.Ct. at 1779 (dissent).

II.

PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW AND THE FIFTH AND SIXTH AMENDMENTS WHERE EVIDENCE OBTAINED FROM A POST-ARREST COMPETENCY EVALUATION WAS USED AGAINST HIM AT TRIAL.

At the time of petitioner's trial, the absence of extreme emotional disturbance was an element of the offense of murder. KRS 507.020; *Edmonds* v. *Commonwealth*, Ky., 586 S.W.2d 24 (1979).[64] Although petitioner argued that he was not guilty of

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[63] Perhaps this is not necessary. This Court has employed a "hybrid doctrine" in analogous cases before. *Duren*, 439 U.S. at 372 (Rehnquist, J., dissenting).

[64] The Kentucky Supreme Court purportedly overruled *Edmonds* in *Wellman* v. *Commonwealth*, Ky., 694 S.W.2d 696 (1985), in holding that absence of extreme emotional distress is not an element of the crime of murder. Nonetheless, the Court, citing *Gall* v. *Commonwealth*, Ky., 607 S.W.2d 97 (1980), stated that "an instruction on murder need not require the jury to find that the defendant was not acting under influence of extreme emotional disturbance, unless there is something in the evidence to suggest that he was, thereby affording room for a reasonable doubt in that respect." *Wellman* at 697. The Court apparently placed the burden of going forward on the defendant, and in such event, placed the burden of non-persuasion on the Common-

any homicide, he called Ms. Elam, a social worker, as his only defense witness in order to establish that, *if* the jury were to believe that he were otherwise guilty of murder, he was acting under the influence of extreme emotional disturbance, and could therefor be guilty only of Manslaughter in the First Degree.[65]

Ms. Elam testified that petitioner had been committed to the Department on May 1, 1980, and was placed at a Youth Development Center in Danville, Kentucky. Approximately one month later, petitioner was evaluted by a psychologist, Dr. Michael Nietzel. The test results showed petitioner to have an IQ of 74. Dr. Nietzel interpreted the test results in tems of "emotional disturbance" and a "mild thought disorder."

Petitioner was transferred to Northern Kentucky Treatment Center, a facility for emotionally disturbed youths, where he was evaluated by Dr. Robert Noelker. Dr. Noelker concurred in Dr. Nietzel's previous diagnosis of thought disorder. Further, Dr. Noelker found Petitioner to be "pretty severely emotionally disturbed . . . very easily confused . . . extremely limited capacity for insight . . . [and] easily lead by other more sophisticated delinquents or youths" [A 65]. Dr. Noelker's report was dated August 21, 1980 [A 64], some 4½ months prior to the offenses for which the petitioner stood trial.

During cross-examination of Ms. Elam, the prosecutor was allowed, over petitioner's objection, to elicit the results of another evaluation, performed *subsequent* to petitioner's arrest, the purpose of which was to determine whether or not the child was competent to understand the juvenile waiver proceedings and to assist his attorney, and further, to deter-

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wealth. Petitioner submits that the holding in *Wellman* in no way affects the disposition of petitioner's case, since he in fact did go forward with evidence of extreme emotional disturbance, and therefore, the trial court properly instructed the jury under either *Edmonds* or *Wellman*.

[65] Pursuant to KRS 507.020, both wanton murder and intentional murder are punishable by imprisonment for 20 years to life. KRS 507.030, on the other hand, provides that Manslaughter in the First Degree is punishable only by 10 to 20 years imprisonment.

mine whether or not David met the criteria for involuntary commitment pursuant to KRS Chapter 202A.[66]

After petitioner's objection was overruled, Ms. Elam was allowed to read to the jury Dr. Lange's report, which provided in part "David was appropriate inneractionally [sic] . . . He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. Affects was . . . generally shallow without imporia or disporia" [A 59].

Importantly, the evaluations and tests used to establish petitioner's mental status shortly before the offenses in question were *not* procured at the instance of petitioner or his counsel in order to prepare a defense to the charges. Rather, they had been obtained incident only to the State's custody of David as a result of his delinquent juvenile status. Accordingly, there can be no inference of feigning, fabrication, or malingering in order to "manufacture" a defense to the charges in question.

Petitioner submits that he was particularly prejudiced by the evidence contained in the report of Dr. Lange's competency evaluation. Dr. Lange's report was the only evidence upon which the jury could possibly have relied to find the absence of emotional disturbance in convicting petitioner of intentional murder.

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[66] At the time of the juvenile proceedings, David Buchanan was still a ward of the State pursuant to his earlier commitment. Because he was being held in a juvenile detention facility, inquiry was made to see whether he might be involuntarily committed to a state mental hospital or institution. KRS 202A.026 provides that:

> No person shall be involuntarily hospitalized unless such person is a mentally ill person:
>
> (1) Who presents a danger or threat of danger to himself, family or others as a result of the mental illness;
>
> (2) Who can reasonably benefit from treatment; and
>
> (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.

Dr. Lange determined that David did not meet the criteria for involuntary commitment, without specifying which criteria were not met, or why he felt that David did not meet the criteria.

(i) The Court Should Adopt A Per Se Rule Barring The Use Of Competency Evaluations As Evidence Of A Defendant's Mental Status At The Time Of An Alleged Defense.

It is elementary, of course, that the conviction of a person while he is legally incompetent violates the guarantee of due process. *Pate* v. *Robinson*, 383 U.S. 375 (1966); *Bishop* v. *United States*, 350 U.S. 961 (1956). In order both to protect an incompetent defendant and to maintain the integrity of criminal proceedings, this Court has placed an obligation upon trial courts to determine competency. In appropriate circumstances, a trial court must act *sua sponte*. *Pate* v. *Robinson*, *supra*. In order that trial courts can meet this obligation, the use of compelled competency examinations have been upheld. *See e.g.*, *United States* v. *Cohen*, 530 F.2d 43 (CA5, 1976), *cert. denied* 429 U.S. 855 (1976); *United States* v. *Albright*, 388 F.2d 719 (CA5, 1968).

Needless to say, if this Court allows any trial use of the results of a competency evaluation, defendants and their counsel will be extremely hesitant to request competency evaluations, even where the need is indicated. Further, this may well result in a situation where defendants refuse to participate, and "sandbag" any issue of competency until after a finding of guilt. This would effectively vitiate the import of this Court's holding in *Pate* v. *Robinson*, and render the competency evaluation a tool of defendants and their counsel to use tactically as they saw fit. Since competency cannot be waived,[67] defendants who refused to participate would then raise the issue in post-conviction proceedings. Simply put, this would result in an intolerable burden on the effective administration of criminal justice.

Furthermore, if the state is allowed to use the results of a competency evaluation to rebut evidence of a mental status defense (i.e., in this case, extreme emotional disturbance), a

[67] ". . . [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate* v. *Robinson*, *supra*, 86 S.Ct. at 841, citing *Taylor* v. *United States*, 282 F.2d 16, 23 (C.A. 8th Cir. 1960).

jury almost certainly will be confused by evidence of competency versus evidence pertaining to culpability for an offense. Obviously, "[t]here is a vast difference between that mental state which permits an accused to be tried and that which permits him to be held responsible for a crime." *Winn* v. *United States*, 270 F.2d 326, 328 (CADC, 1959). See also *United States ex rel Mireles* v. *Greer*, 736 F.2d 1160 (CA7, 1984). "[T]here is a difference between the concept of 'insanity' and mental competency to stand trial. The former concept relates to the merits of the case. . . . Mental competency to stand trial, on the other hand, implicates constitutional standards with regard to procedural fairness. A showing that an accused is mentally incompetent to proceed to trial does not establish a defense to the substantive charge, but rather mandates a continuation of the trial until such time as the accused is mentally capable of proceeding." *Davis* v. *Campbell*, 465 F.Supp. 1309, 1317 (E.D. Ark., 1979). Otherwise stated, "a person's mental competency to stand trial and his mental condition at the time the offenses were committed are *two fundamentally different issues*." *Wood* v. *Zahradnick*, 475 F.Supp. 556, 558 (E.D. Va., 1979).[68] In fact, the Fifth Circuit Court of Appeals has emphasized that "trial courts should be vigilant in minimizing unnecessary references to competency issues. References that are irrelevant and are elicited in bad faith may indeed have a prejudicial effect on the defendant's right to a fair trial on the issue of sanity. This must not be tolerated." *United States* v. *Fortune and Barfield*, 513 F.2d 883, 888-889 (CA5, 1975). In *Fortune*, despite the references to a competency evaluation, the Fifth Circuit affirmed the defendant's conviction. However, there were cir-

[68] That jurors would be confused by the introduction of evidence from a competency evaluation, introduced to rebut evidence on a mental status defense, should come as no surprise. Apparently, the medical profession itself often confuses the two legal concepts. As one commentator has noted, "Indeed, there is repeated evidence that psychiatrists often misunderstand the tests of incompetency and confuse it with the test of criminal responsibility." Note, 81 Harv. L. Rev. 454, 470 (1967); See also Robey, *Criteria for Competency to Stand Trial: A Checklist For Psychiatrists*, 122 Am. J. of Psychiatry 616 (1965). Of course, because the State never called Dr. Lange as a witness, petitioner was unable to confront or cross-examine him as to the basis of his opinion, further compounding the prejudice.

cumstances in *Fortune* not present herein. In the first place, the trial court had ordered the defendants evaluated to determine *both* competency to stand trial *and* sanity at the time of the offense. The defendants had called as their witness the psychiatrist who had evaluated them. The psychiatrist was asked on cross-examination by the government's counsel the reason for his examining Barfield. The doctor replied that he was referred for "a psychiatric evaluation to determine whether he was competent to stand trial." When defense counsel objected, the trial court "told counsel that the prosecution was entitled to cross-examine the witness, but that he did not want to get into the issue of competency to stand trial *because it had no bearing on the case.*" *Id* at 887. In affirming, the Fifth Circuit stated that:

> While we agree with Barfield that any reference to a competency examination is undesirable in the context of a defense based on insanity, we think that the statutory construction he suggests is both unwarranted and unrealistic. In circumstances, as here, where the same psychiatrist has examined the defendant to determine sanity at the time of the offense, as well as competency to stand trial, it may well be impossible to prevent all references to the fact of a competency examination. Indeed, judicial gymnastics directed toward the annihilation of all such references may, in some circumstances, have a more undesirable effect, in terms of distortion of testimony, than would the references themselves. *Id* at 887.

Unlike the facts in *United States* v. *Fortune*, *supra*, the reference to the competency evaluation in petitioner's case was not limited to merely demonstrating the circumstances in which the psychiatrist, Dr. Lange, came to examine petitioner. In contradiction of the earlier evaluations, the jury heard that Dr. Lange was of the opinion that petitioner demonstrated "appropriate interaction," "good reality contact," and exhibited a "full normal I.Q. range."

At trial, the absence of emotional disturbance was an ultimate material fact which the state was obligated to prove in order to convict petitioner of intentional murder. The Commonwealth sought to disprove the presence of emotional disturbance at the time of the offense by showing that petitioner was

competent to stand trial. However, whatever basis Dr. Lange relied upon in his determination of petitioner's competency is not relevant to a pre-existing emotional disturbance. Clearly, even an extremely emotionally disturbed person m[illegible] be competent. In reality, very few criminal defendants who are mentally or emotionally impaired are ever found to be incompetent to stand trial. As stated by a prominent clinical professor of psychiatry, "[e]ven a man floridly psychotic and plagued by hallucinations may very well comprehend, for example, that he is being charged with murder, that the evidence for and against this charge will be presented to twelve people who will then sit in judgment upon him, and that his life may depend upon his testimony and upon his telling his attorney all that he can about himself and his role, if any, in the offense charged against him. Neither amnesia nor an incredibly fantastic concept of his activities at the time of the offense necessarily denies the accused his right to stand trial, though clearly either may add significantly to the burdens of defense counsel." Blinder, M.D., Psychiatry In The Every Day Practice of Law, 2nd. Ed., § 7.3, pp. 303-304, (1982).

This Court should not countenance the State's use of evidence which is not only irrelevant to any issues invovled in the case, but further, when that very evidence comes into being only because a court has exercised its constitutional mandate in attempting to determine the competency of a criminal defendant to proceed to trial. The constitutional guarantee of due process acts as a shield to protect defendants from being tried while incompetent; the State should not be allowed to batter and twist that shield into a sword to be used by the State against that very defendant.

(ii) The Use Of An Unwarned Competency Evaluation Violates The Defendant's Fifth Amendment Privilege To Be Free From Compelled Testimony And Also His Sixth Amendment Right To Assistance Of Counsel.

This Court has already determined that an unwarned pretrial psychiatric evaluation cannot be used in the sentencing

phase of a capital proceeding. *Estelle* v. *Smith*, 451 U.S. 454 (1981).

Of course, it is of no consequence that the competency evaluation was used during the trial in chief herein rather than during sentencing: "We can discern no basis to distinguish between the guilt and penalty phases . . . so far as the protection of the Fifth Amendment privilege is concerned." *Estelle*, *supra*, 101 S.Ct. at 1873.

In *Estelle*, Dr. Grigson, who had interviewed Smith prior to trial to determine his competency, testified based upon information he derived from the "mental status examination" of Smith. Dr. Grigson informed the jury of his diagnosis of Smith, his opinion as to Smith's poor prognosis, and Smith's lack of remorse.

On appeal, this Court specifically refuted the State's contention that neither the Fifth nor the Sixth Amendments were implicated. With regard to the Fifth Amendment, this Court observed that:

> In Miranda v. Arizona, [cite omitted], the court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." [Cite omitted]. Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." [Cite omitted]. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise."

> *The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here.* Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. *When Dr. Grigson went beyond simply reporting to the court on the issue of competency and testified for the prosecution* at the penalty phase on a crucial issue of respondent's future dangerousness, *his role changed and became essentially like that of an agent of the State recounting unwarned statements made in the post-arrest custodial setting*. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] perso[n] acting solely in his interest." [Cite omitted]. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that accordingly, he had a constitutional right not to answer the questions put to him. *Estelle* v. *Smith*, *supra*, 101 S.Ct. at 1875.

This Court held that Smith's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase. The same considerations compel that result here. Petitioner was in custody when the examination was conducted at the instance of the Juvenile Court. Petitioner was given no warnings that his responses could be used against him at trial. Even though Dr. Lange did not testify, his report was nonetheless used to discredit petitioner's claim of emotional disturbance. As in *Estelle*, there is no doubt that the Fifth Amendment is indeed implicated by the use of Dr. Lange's report because the jury heard evidence of statements made by petitioner to Dr. Lange,[69] and further, because Dr. Lange's clinical observations were obviously based upon other unreported statements by petitioner. The clear import of Dr. Lange's report is that he based his clinical opinion on the

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[69] For example, the jury heard evidence that "David states at times he has been very angry at certain people, staff at the center and thought about hurting them." [A 59].

testimonial content of what petitioner said. As in *Estelle* v. *Smith*, there is no evidence that the psychiatrist's diagnosis had been founded only upon petitioner's "mannerisms, facial expressions, attention span or speech patterns. . . ." *Estelle* v. *Smith*, 101 S.Ct. at 1873, fn. 8. As this Court stated, citing the Amicus Brief of the American Psychiatric Association in *Estelle*, "absent a defendant's willingness to cooperate as to the verbal *content* of his communications, . . . a psychiatric examination in these circumstances would be meaningless." *Id.* Simply put, a psychiatric evaluation based upon a clinical interview is readily distinguishable from non-testimonial evidence such as voice exemplars, handwriting exemplars, line-ups, blood samples or fingerprints.

Further, this Court concluded in *Estelle* v. *Smith* that petitioner therein had a Sixth Amendment right to the assistance of counsel before he submitted to the psychiatric examination. This Court stated:

> Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. [Cite omitted]. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Estelle* v. *Smith*, *supra*, 451 U.S. at 470-471.

Notably, this Court did not find that Smith had the right to have counsel actually present at the competency evaluation. Rather, the crux of the holding was that Smith had a Sixth Amendment right to *consult* with counsel prior to the evaluation, and further, to make an intelligent decision as to whether or not to participate in the examination, based upon counsel's advice as to any use to which the state *might* put the results of the examination. The same holds true for petitioner herein. The Juvenile Court ordered the evaluation in question. There was never any notice to counsel that the state would use the results of that evaluation to prejudice a material aspect of

petitioner's defense. This was precisely the concern of this Court in *Estelle* in finding a violation of Smith's Sixth Amendment right to counsel:

> As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's bias and predilections, [and] of possible alternative strategies at the sentencing hearing." [Cite omitted]. It follows logically from our precedents that a defendant should not be forced to resolve such an important issued without "the guiding hand of counsel." *Estelle* v. *Smith*, *supra*, 451 U.S. 471.

In analyzing the applicability of the principles enunciated in *Estelle* v. *Smith*, this Court should distinguish the circumstances of petitioner's trial from those instances in which other courts (and this Court in dicta in *Estelle*)[70] have indicated that a criminal defendant waives his constitutional rights by introducing defense evidence of insanity. For example, the Eleventh Circuit Court of Appeals has held that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Booker* v. *Wainwright*, 703 F.2d 1251 (CA11, 1983), citing *Battie* v. *Estelle*, 655 F.2d 692, 702 (CA5, 1981). However, the facts of petitioner's case are clearly distinguishable from the facts of either *Booker* or *Battie*. For example, in *Booker*, the defendant had filed a notice of insanity defense, and also had requested a psychiatric evaluation in order to determine his *sanity* at the time of the offense. Accordingly, when Booker testified during the sentencing proceedings that he had no recollection of the day of the crime, the Eleventh Circuit found that the prosecutor acted properly in impeaching his testimony with information Booker gave to the psychiatrist during the evaluation.

Unlike the situation in *Booker*, however, petitioner never testified at his trial. Therefore, the state should not have been

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[70] *Estelle* v. *Smith*, 101 S.Ct. at 1874.

allowed to use Dr. Lange's report as "impeachment," even though the report may have contradicted the reports put into evidence by petitioner. It must be remembered that at the time of petitioner's early evaluations, he was not facing any pending criminal charges. He had been previously adjudicated delinquent and committed to a state facility for *treatment*. Accordingly, he had no fifth amendment privilege to "waive."

The Fifth Circuit in *Battie* v. *Estelle*, *supra*, has also stated that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Battie* v. *Estelle*, 655 F.2d at 701-702. The Court further stated, noting agreement by "virtually every other federal and state court addressing this issue," that this result "is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Id.* at 702. Neither of the justifications relied upon by the Fifth Circuit and other federal courts are present in petitioner's case. In the first place, the evidence presented by petitioner in fact was the State's "own psychiatric examination of the accused," dating from petitioner's commitment as a juvenile. The reports were not "defense" psychiatric evaluations. Further, it would be absurd to assert in petitioner's case that the State had any interest in preventing "fraudulent mental defenses," in that petitioner was relying upon evidence which was in existence long before the offense was ever committed. Consequently, assuming *arguendo* that there may in some circumstances be an implied waiver of the fifth amendment privilege by the introduction of psychiatric evidence, no such "waiver" can be found to exist by the type of evidence introduced by petitioner at his trial.

Because the introduction of evidence from petitioner's competency evaluation by Dr. Lange was introduced against him at trial, and further, because neither petitioner nor his counsel were advised that his responses would be used against him, the introduction of such evidence violated both the Fifth and Sixth Amendments. Accordingly, petitioner respectfully requests this court to reverse his conviction and to grant him a new trial.

CONCLUSION

For all the reasons stated, petitioner respectfully requests that the decision of the Kentucky Supreme Court in his case be reversed.

Respectfully submitted,

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